Supreme Court, U.S.
FILED
06-504 JUN 5 - 2006
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

EUI SIK CHUN
Petitioner,

v.

ALBERTO R. GONZALEZ
U.S. Attorney General
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

XENOS M. YUEN
Counsel of Record
6100 Corporate Drive,
Suite 400
Houston, TX 77036
Tel.(713) 541-2691

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner 4th, 5th and 14th Amendment Rights were violated when Petitioner was arrested at a gas station in Houston, Texas without a warrant or a probable cause and subsequent Petitioner home was searched and his passport and entry document was seized from his brief case inside his home, again without a search warrant or probable course.

2. Whether Petitioner was denied due process of law in 5th Amendment, 6th Amendment and 14th Amendment Right of the United States Constitution when Immigration Judge refused to convene a suppression of evidence hearing and refuse to subpoena government witnesses to allow Petitioner to cross examination or to authenticate the documents presented by Government to support a Removal Order issued by the Immigration Judge.

3. Whether the Board of Immigration Appeals abused its discretion in refusing to remand petitioner's case to the immigration court for consideration of his application for adjustment of status based on his bona fide marriage to a United States citizen

PARTIES TO THE PROCEEDING

Petitioner is Eui Sik Chun, Houston, TX, represented by Xenos Yuen, Attorney, 6100 Corporate Dr. Suite 400, Houston, TX 77036

Respondent is the U.S. Attorney General, Alberto R. Gonzalez, U.S. Immigration and Customs Enforcement, Julie L. Myers, Assistant Secretary, and Department of Homeland Security, Michael Chertoff, represented by Mr. Russell J.E. Verby, Office of U.S. Attorney, Office of Immigration Litigation, civil Division, P.O. BOX 878, Ben Franklin Station, Washington, D.C. 20044.

TABLE OF CONTENTS

	Page
QUESTONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv-v
BASIS FOR JURISDICTION	1
CONSTITUTION AND LAWS	1-9
STATEMENT OF THE CASE	10-14
ARGUMENT	15-19
APPENDIX	
A. U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court, Houston, TX, Order Decision of the Immigration Judge, File A78-998-531, April. 16, 2003	App.1-8
B. U.S. Department of Justice, Executive Office for Immigration Review, Decision of the Board of Immigration Appeals, File A78-998-531, September 09, 2004	App.9-10
C. U.S. Court of Appeals for the 5TH Circuit, Petition for Review from the Board of Immigration Appeals, No. 04-60904, January 4, 2006	App.11-16
D. U.S. Court of Appeals for the 5TH Circuit, On Petition for Rehearing, No. 04-60904, March 08, 2006	App.17
E. U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court, Transcript (Excerpts), File A78-998-531, October 16, 2002	App.18-27

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS	Page
8 U.S.C. § 1252	App.15
8 C.F.R. § 287.6 (a)	3
CASES	
Bong Youn Choy v. INS, 279 F.2d 642 (9th Cir. 1960)	16
Che v. INS, 565 F.2d 166 (1st Cir. 1977)	16
Matter of Garcia, Interim Decision 2778 (BIA 1980)	16
Marlowe v. INS, 457 F.2d 1314, 1315 (9th Cir. 1972)	18
Reno v. Flores, 507 U.S. 292 (1993)	15
Ex parte Jackson, 263 F. 110 (D. Mont. 1920)	
Jen v. INS, 566 F.2d 1095 (9th Cir. 1977)	17

Martin-Mendoza v. INS, 499 F.2d 918, 921 (9th Cir. 1974) 18

Navarrette-Navarette v. Landon, 223 F.2d 234, 237 (9th Cir. 1955), cert. denied, 351 U.S. 911 (1956). 18

Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977) 16, 17

Matter of Toro, 17 I&N Dec 340 (BIA 1980) 15, App.3

Trias-Hernandez v. INS, 528 F.2d 366, 369 (9th Cir. 1975) 18

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 15

Matter of Velarde, 23 I&N Dec. 253 (BIA 2002) 18, App.9

Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903) 17

JURISDICTION

The Honorable U.S. Supreme Court has jurisdiction pursuant to 28 U.S.C. § 2101(e).

CONSTITUTION AND LAWS

United States Constitution

[Amendment IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Amendment V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Article. XIV.

Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of

representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

8 C.F.R. § 287.6 (a)

TITLE 8--ALIENS AND NATIONALITY

CHAPTER I--DEPARTMENT OF HOMELAND SECURITY

PART 287_FIELD OFFICERS; POWERS AND DUTIES--Table of Contents

Sec. 287.6 Proof of official records.

(a) Domestic. In any proceeding under this chapter, an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy.

(b) Foreign: Countries not Signatories to Convention.

(1) In any proceeding under this chapter, an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized. This attested copy in turn may but need not be certified by any authorized foreign officer both as to the genuineness of the signature of the attesting officer and as to his/her official position. The signature and official position of this certifying foreign officer may then likewise be certified by any other foreign officer so authorized, thereby creating a chain of certificates.

(2) The attested copy, with the additional foreign certificates if any, must be certified by an officer in the Foreign Service of the United States, stationed in the foreign country where the record is kept. This officer must certify the genuineness of the signature and the official position either of (i) the attesting officer; or (ii) any foreign officer whose

certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.

(c) Foreign: Countries Signatory to Convention Abolishing the Requirement of Legislation for Foreign Public Document.

(1) In any proceeding under this chapter, a public document or entry therein, when admissible for any purpose, may be evidenced by an official publication, or by a copy properly certified under the Convention. To be properly certified, the copy must be accompanied by a certificate in the form dictated by the Convention. This certificate must be signed by a foreign officer so authorized by the signatory country, and it must certify (i) the authenticity of the signature of the person signing the document; (ii) the capacity in which that person acted, and (iii) where appropriate, the identity of the seal or stamp which the document bears.

(2) No certification is needed from an officer in the Foreign Service of public documents.

(3) In accordance with the Convention, the following are deemed to be public documents:

(i) Documents emanating from an authority or an official connected with the courts of tribunals of the state, including those emanating from a public prosecutor, a clerk of a court or a process server;

(ii) Administrative documents;

(iii) Notarial acts; and

(iv) Official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures.

(4) In accordance with the Convention, the following are deemed not to be public documents, and thus are subject to the more stringent requirements of Sec. 287.6(b) above:
(i) Documents executed by diplomatic or consular agents; and (ii) Administrative documents dealing directly with commercial or customs operations.

(d) Canada. In any proceedings under this chapter, an official record or entry therein, issued by a Canadian governmental entity within the geographical boundaries of Canada, when admissible for any purpose, shall be evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy

TITLE 8--ALIENS AND NATIONALITY

CHAPTER 12--IMMIGRATION AND NATIONALITY

SUBCHAPTER II--IMMIGRATION

Part V--Adjustment and Change of Status

Sec. 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of

title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

I.N.A. Sec. 201(b). [8 U.S.C. 1151]

(b) Aliens Not Subject to Direct Numerical Limitations. - Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a), are as follows:

(1)(A) Special immigrants described in subparagraph (A) or (B) of section **101(a)(27)**.

(B) Aliens who are admitted under section **207** or whose status is adjusted under section **209**.

(C) Aliens whose status is adjusted to permanent residence under section **210**, or **245A**.

(D) Aliens whose removal is canceled under section **240A(a)**.

(E) Aliens provided permanent resident status under section **249**.

(2)(A)(i) Immediate relatives. - For purposes of this subsection, the term ``immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not

legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section **204(a)(1)(A)(ii)** within 2 years after such date and only until the date the spouse remarries. **3/** For purposes of this clause, an alien who has filed a petition under clause **(iii)** or **(iv)** of section **204(a)(1)(A)** of this Act remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse.

Sec. 1003.2 Reopening or reconsideration before the Board of Immigration Appeals.

(c) Motion to reopen. (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen

subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in Sec. 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

STATEMENT OF FACTS

The Petitioner is a 57-years old man and a native and a citizen of the Republic of South Korea who was admitted to the United States as a nonimmigrant visitor on August 17, 2000. One day, as Petitioner parked his car in a Houston Parking Lot of a gas station, two immigration officers approached him and arrested him without an arrest warrant. Handcuffed, they took Petitioner into their vehicle, searched for his home address in his wallet, immediately drove to Petitioner's home. The Officers then took his house keys from his pocket, opened the door and searched his house and brief case, again without a search warrant. The Officers seized his passport and entry document (I-94). Petitioner was taken in custody by the Service and later released with a $10,000.00 appearance bond. Service issued a Notice To Appear, I-862 on October 9, 2002, alleging Petitioner overstayed his visiting visa pursuant to Immigration and Nationality Act §237(a)(1)(c)(i) and §237(a)(1)(B). Petitioner sought to suppress the illegally seized evidence. Said Motion to Suppress was denied. Petitioner sought to suppress the Service internal documents, the National Immigration Information System "NIIS", computer printout to show Petitioner was overstayed the visitor status by alleging the printout as a "fruit of the poisonous tree" as a result of the Service illegal search and seizure. Immigration Judge denied the motion. Petitioner sought to subpoena the officers who produced the NIIS printout for cross examination as how the officers could identify the Petitioner among ten of millions of visitors' records per year and what probable cause did the Service had at the time of arrest as to why the Petitioner

could be singled out in a metropolitan Houston city with over 4 million residents.[1]

The motion was again denied during a hearing on February 25, 2003 by stating he did not want to "complicate what is a relatively simple matter." TR P.9-10, 12, and stated the Petitioner's claims of unlawful arrest are "outside my jurisdiction and outside my concern." TR p.11. No Suppression hearing was ever conducted. Over the objection of the Petitioner, the Immigration Judge admitted the NIIS printout without predicate and without proper authentication. TR p. 26. Transcript shows the Immigration Judge inquired of Government counsel, as follows:

JUDGE TO MS. WILKINS:

Q. Ms. Wilkins, where did you obtain the, the NIIS –

A. From our special Government data bases, it is a computer system.

Q. Who was it that obtained the documents or the information from the data base?

---

[1]Petitioner requested subpoenas to issue for the attendance at suppression and deportation hearings of the informant, arresting officers, transporting officers, searching officers, officer Duane A. Rogers, and the officer who prepared the NIIS documents allegedly related to petitioner and used by government counsel in her response to petitioner's motion to suppress evidence.

A. It was initially, these documents were initially attached to a motion by the attorney, Pauline Appelbaum of our office and I believe that she obtained those documents and then I resubmitted the exact same documents to the court. TR p. 27.

This admission that the person offering the NIIS documents had only second hand knowledge of them satisfied the Immigration Judge. He ruled that, based solely on the arrival and departure dates contained the NIIS printouts, that petitioner was deportable. TR p. 28-29.

Petitioner was later married to Ms. Sun Ok Chun, a Legal permanent resident, on December 2, 2002. A spousal petition was filed on April 14, 2003 on his behalf. The marriage is a genuine marriage and last until today. Besides, the Service approved the petition on November 3, 2005, notice of approval, Form I-797. Despite the petition filed, the immigration judge did not continue or abate the removal proceeding, but proceeded to remove Petitioner.

Petitioner timely filed an appeal to the Board of Immigration Appeal ("B.I.A.") on May 14, 2003. Petitioner's wife was naturalized to become a United States Citizen on July 30, 2004 and the filed petition would automatically transformed to an "immediate relative" petition and be exempted from visa quota requirement and the permanent resident visa becomes immediately available to Petitioner through the visa petition. On August, 20, 2004, Petitioner filed a motion to remand with B.I.A. based upon the new category of the visa petition. On September 9, 2004, B.I.A. denied the appeal and the motion to remand on the

same date, alleging petitioner failed to file an adjustment of status, Form I-485, as to proof the marriage is a "genuine marriage" is legally insufficient for BIA to grant the motion to remand, despite the fact the Service actually approved the spousal petition on November 3, 2005, pursuant to Immigration and Nationality Act § 201(b).

On October 17, 2005, Petitioner filed a Notice to Review before the Honorable 5th Circuit Court of Appeal. Concurrently, on November 18, 2005, Petitioner filed a Motion to Reopen with B.I.A. pursuant to 8CFR1003.2(c)(1) based upon the long delayed approval of the visa petition. Both appeal and motion to Reopen were denied. 5th Circuit judges upheld the B.I.A. ruling, found B.I.A. did not abuse its discretion in refusing to remand the case back to Immigration Judge. Further, 5th Circuit stated the Fourth Amendment exclusionary rule does not apply to deportation proceedings, citing Lopez-Mendoza, 468 U.S. 1032, 1050 (1984). As such the 5th Circuit states "....even if we concluded that the NIIS data about Chun was derived from an illegal search and seizure, the immigration court would not need to suppress it." Further, the 5th Circuit Court in his decision on p.6 stated that "the rules of evidence do not apply to deportation proceedings, citing Bustos-Torrs V. INS, 898 F.2d 1053, 1055 (5th circuit 1990). The Court proceeded to conclude the NIIS is "probative" and it use is "fundamentally fair" and did

---

[1] In support of his motion to remand, petitioner submitted a Marriage License dated December 2, 2002; a Receipt Notice for his wife's Immigrant Petition for Relative (Form I-130) filed for his benefit on April 15, 2003; and a Certificate of Naturalization of his wife issued July 30, 2004.

not "deprive the alien of due process of law". The Petition for review was denied. When request for rehearing, en banc, the 5th Circuit Court wrote "denied".

THE ARGUMENT

It is unimaginable a case of this sort is allowed to happen in the United States of America. It is certainly not a single incident. In fact, the Court must not allow this terror to victimize any person of this country, whether or not he is an alien or a citizen.

The simple fact is the government abused her power in arresting a person without probable cause, without a warrant, put him through a deportation proceeding (a "civil" proceeding) by denying him all his constitutional rights (4th, 5th, 6th and 14th Amendment Rights of United States Constitution) and then had him deported. The lower courts put on their blindfold and interpreted the laws in piecemeal, calculated to perpetuate the miscarriage of justice.

An alien in the United States, unlike one applying for entry at the border, is entitled to the full benefits of procedural due process, including a fair hearing. See Reno v. Flores, 507 U.S. 292 (1993).

Although the precedent case established the Evidence resulting from a search and seizure in violation of Fourth Amendment rights in a deportation proceeding may not for that reason alone excludable. However, if the violation of 4th Amendment right is so egregious that to rely on it would offend the Fifth Amendment's due process requirement of fundamental fairness, the alien, although involved in a deportation proceeding, the "evidence" so acquired must be suppressed. See *Ex parte Jackson*, 263 F. 110 (D. Mont. 1920) (illegal entry and search; denial of confrontation; improper motive). *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (stopping or detaining persons for questioning about citizenship on less than a reasonable suspicion that they may be aliens), *Matter of Toro*, 17 I&N Dec 340 (BIA 1980)

(questioning woman with "obvious Latin appearance" disapproved prospectively). In addition, in *Matter of Garcia*, Interim Decision 2778 (BIA 1980); *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977) (coerced confession); *Bong Youn Choy v. INS*, 279 F.2d 642 (9th Cir. 1960) (involving involuntary statements).

In the case at bar, the lower courts refused to address or allow the arresting officer to come forth to testify how the Petitioner was actually singled out from millions of NIIS printout or why the Petitioner was arrested when he stepped out of his car in a parking lot in the city of Houston, Texas, not a border town by definition, despite an anonymous tip as alleged given to the Service that the alien is being employed there illegally. No evidence of any kind has been offered why the Petitioner is being arrested in a parking lot of a gas station. Worse, the trial court refused even to allow the officers who arrested him and the officer who offered some NIIS printout to come forth to testify whether the information leads to his arrest is a "probative" evidence to be admitted against the Petitioner or how the officer can identify the NIIS printout, without the use of the Petitioner's passport or entry document. The lower courts, including the 5th Circuit Courts of Appeal, focus on the nature of NIIS printout are probative evidence and therefore survived hearsay exclusion. However, the Court did not, or refused to discuss how the NIIS of the Petitioner can be identified in the first place without the need of the illegally seized documents from the Petitioner's home. The Immigration Judge's denial of petitioner's request for an evidentiary suppression hearing and his refusal to subpoena these officers to be cross examined in immigration court is clearly violation of the right of legal counsel for privilege to cross examination an adverse witness. *Che v. INS*, 565 F.2d 166 (1st Cir. 1977)

(manner of obtaining critical evidence uncertain; remanded for evidentiary hearing on motion to suppress).[1]

Certainly, petitioner met this threshold burden and was entitled to a hearing.

The Government bagged the question when she argued that the NIIS data would have been "inevitably discovered" and was obtained from an "independent source." Petitioner was entitled to a suppression hearing to determine the veracity of the Government's claims. The Immigration Court denied petitioner due process when it blithely accepted the Government's claims without a hearing and right to cross examine the government testimony or evidence. Moreover, the Immigration Court's procedures were fundamentally unfair. By requiring petitioner to respond to the Notice to Appear before it would consider suppressing evidence. If this procedure is allowed, one responding to a Notice to Appear will never be able to challenge the lawfulness of the process by which he or she is brought before the Immigration Court. This Court must not tolerate the complete disregard for constitutional rights exhibited by the Immigration Judge.

A proceeding to expel an alien from the United States obviously involves momentous stakes. The consequences of deportation often are graver than criminal punishment. The manner in which determinations of deportability are made consequently raise issues of considerable importance. *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).

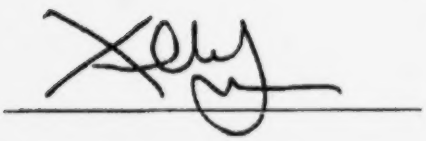
---

[1] See also *Jen v. INS*, 566 F.2d 1095 (9th Cir. 1977) (immigration judge rejected motion to suppress evidence; avoiding need to decide constitutional issue, court remanded case so government could present untainted evidence); *Navia-Duran v. INS*, 568 F.2d 803, 807 (1st Cir. 1977) (subpoena of officers refused; Government produced no testimony to refute respondent's statements regarding illegal actions vitiating confession; remanded).

To be admissible in deportation proceedings, evidence must be probative and its use fundamentally fair so as to not deprive respondents of due process of law as mandated by the Fifth Amendment. See *Trias-Hernandez v. INS*, 528 F.2d 366, 369 (9th Cir. 1975); *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974); *Marlowe v. INS*, 457 F.2d 1314, 1315 (9th Cir. 1972); *Navarrette-Navarette v. Landon*, 223 F.2d 234, 237 (9th Cir. 1955), cert. denied, 351 U.S. 911 (1956).

The B.I.A. and the 5th Circuit Court of Appeal abused their discretion by misapplying the Velarde decision in making its ruling. Congress intended, and the *Valarde* decision holds, that a pending Form I-130 petition, like the one petitioner presented the Board, is *prima facie* evidence of a bona fide marriage sufficient to overcome the presumption of fraud arising from marriage during removal proceedings. The *Velarde* case merely mentions that the movant there had filed an adjustment application. Its holding, however, focuses only on the visa petition, and this make perfect sense because the visa petition concerns the marriage, whereas the adjustment application concerns processing factors other than a legitimate marriage. In fact, with highlight of 20/20 vision, the Service admitted that the marriage is indeed a genuine marriage despite the BIA's or adverse findings by approving the spousal petition in 2005. Further, it clearly showed the B.I.A. abused its discretion by refusing the Petitioner the "single opportunity" granted by Congress to adjust his status during removal proceeding.

Respectfully,



Xenos Yuen, Attorney
Law Offices of Yuen & Associates, P.C.
6100 Corporate Dr. Suite 400
Houston, TX 77036
Tel (713) 541-2691
Fax (713) 541-9409

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court, Houston, TX
Order Decision of the Immigration Judge
File A78-998-531
April. 16, 2003

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Sitting in Houston, Texas

File A 78 998 531 April 16, 2003

In the Matter of
EUI SIK CHUN,) IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE: Section 237 (a) (1) (B) – nonimmigrant remained longer than permitted

APPLICATIONS: Termination of proceedings; alternatively: Voluntary departure

ON BEHALF OF RESPONDENT:
Xenos Yuen, Esquire
6100 Corporate Drive, No. 400
Houston, TX 77036

ON BEHALF OF HOMELAND SECURITY:
Lisa Luis,
Assistant District Counsel
Houston District

ORAL DECISION OF THE IMMIGRATION JUDGE

Pursuant to a Notice to Appear, dated September 10, 2002 (Exhibit 1), respondent is charged with removal as indicated above. It is noted that these proceedings were

initially before the court at the Houston Service Processing Center while the respondent was in Government custody. The presiding judge confirmed service of the Notice to Appear, marked it was Exhibit 1 as indicated and additionally marked at the time, Exhibit 2, copy of I-213, record of deportable alien. No inquiry was made with regard to any comments or objections with regard to the I-213 at the time it was introduced into the record by the judge at the Service Processing Center.

Respondent was subsequently released from Government custody and the matter transferred to the non-detained court. Respondent initially appeared before the Court on February 25th, represented by counsel as indicated above. The Court was advised that respondent requires a Korean interpreter in order to translate during the course of these proceedings. Additionally the Court noted that filed prior to hearing was a motion to suppress along with a Government response to that motion, both of which may be found in the record at Exhibit 3.

The Court announced at the master calendar proceeding that the motion to suppress was preliminary denied in that at this stage of proceedings there was nothing to suppress, no evidence had been submitted with regard to the underlying allegations and charge, but for the I-213 which the Court was not prepared to address at that setting. Looking at the text of respondent's motion to suppress, it appears that respondent's claim was based upon the circumstances of his arrest by the immigration officers and the belief that he was arrested without Immigration officers and personal documents were taken.

Respondent also submitted a request for subpoena (Exhibit 4) and a "motion to abate" which the Court believes

would be more accurately characterized as a motion for continuance (Exhibit 5).

The matter was rescheduled from February 25th until March the 3rd to allow for a hearing with regard to the underlying allegations and charge, the Court instructed this Immigration attorney to refile with the Court, as a separate filing in a separate package, documentation or evidence that the Government would be seeking to introduce in support of the underlying allegations and charge(s) in this matter.

In that regard, the Court would note the Notice to Appear as originally prepared contained two charges, alleging violation of Section 237 (a) (1) (B) as it relates to a nonimmigrant who has remained longer than permitted and 237 (a) (1) (C) (i) as it relates to failure to comply with conditions of nonimmigrant status under which admitted. It should be noted that the second charge, the failure to comply charge, and the relating allegation 6 were withdrawn by Government counsel when Court reconvened on March the 12th.

When Court reconvened on March the 12th, respondent's counsel also renewed a request for hearing into the circumstances of respondent's arrest and suppression of evidence that may have been derived therefrom. The Court would note that it is well settled that there are limitations to the application of the exclusionary rule in deportation/ removal proceedings (See INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)) and additionally also limitations on the inadmissibility of evidence that may have been potentially obtained in violation of the Fifth Amendment rights. See, generally, Matter of Toro, 17 I&N Dec. 340 (BIA 1980). At least preliminarily looking at the representations contained in the motion to suppress and prior to review of the specific evidence that the Government was seeking to have

considered, the Court did not perceive a need to hold a separate hearing on these potential issues.

In point of fact, the whole issue of suppressibility and the exclusionary rule became moot when respondent's counsel admitted alienage and Korean citizenship. Once it was established before the Court that alienage is not an issue in this matter, the burden then shifted under Section 291 of the Immigration and Nationality Act to the respondent to provide evidence of time, place, and manner of entry. At least within the context of the earlier hearing in this regard, respondent declined to submit any evidence specifically relating to "time, place, and manner of entry."

Briefly reviewing the documentation submitted by Government counsel, which was initially tabbed A-I, and the Court separated these materials, nothing that the materials tabbed A-H were not directly relevant to the charge that respondent remained in the United States for a longer time than permitted. These materials may be found in the record for identification purposes only in Exhibit 6 and played no part in the finding that respondent is subject to removal as charged.

Separated from these materials and included as separate Exhibit 7, is a copy of a computer-generated report evidencing that Eui Sik Chun, citizen of Korea, born May 5th, 1950, was admitted to the United States on August 17th, 2000, as a B-2 nonimmigrant visitor, pre-inspection, Toronto, Canada and authorized to remain until February 16th, 2001. He was inspected for entry into the United States with a visa issued in Seoul on March 7th, 1996, traveled on Continental Airlines, Flight 1537.

The Court would note that this is a record that was generated by the Immigration officers prior to the institution of these proceedings, this is a record that is solely within the

Government information file and the Court does not believe that this record is suppressible based upon respondent's argument that Immigration officers may have subsequently violated constitutional rights.

Based upon the computer-generated report, the Court would find that respondent has remained in the United States for a longer time than permitted, beyond the February 16th, 2001, date as alleged, and no claim has been raised with regard to any extensions that may have been provided by the Immigration officers. Although respondent's counsel advised that at one point, respondent was the potential beneficiary of a previously filed I-130 petition. The Court would note that the filing of an I-130 petition in the pendency of an application for adjustment of status does not serve as an extension of nonimmigrant authorized stay.

Otherwise respondent is subject to removal under the presumption in Section 291 that he is an alien present in the United States in violation of law. Either way the charge is sustained by "clear, convincing" and in this case "unequivocal evidence."

Throughout these proceedings respondent has declined to designated a country to which removal should be directed and in the absence of choice, the parties have been advised that the Court would direct removal to respondent's native country of Korea, that being the Republic of Korea or South Korea as it is commonly referred. The Court was advised that respondent would not be seeking withholding of removal with regard to the Court's designation.

Instead, as sole relief given the Court's denial of respondent's request for termination of these proceedings, respondent seeks opportunity to voluntarily depart. Hearing on the voluntary departure request was held and completed on April 16th, 2003. Respondent was the only witness to

testify, though the Court was advised that present and potentially available was respondent's current lawful permanent resident spouse. The Court was advised that respondent married in December of 2002, during the pendency of these proceedings, that there is an I-130 pending with the Department of Homeland Security, filed by his current spouse, however it is noted that a visa is not currently available under the second preference category and it is not contemplated that a visa would be available for a number of years, even assuming the application had been approved at this time.

With regard to the voluntary departure application, respondent's counsel expressed respondent's intent to reserve right of appeal, therefore voluntary departure is considered under Section 240B(b) of the Immigration and Nationally Act and respondent is required to demonstrate and establish "good moral character," willingness to depart as required, post a voluntary departure bond, and provide proof or evidence of suitable travel document, and additionally receive favorable discretion for his request for voluntary departure.

In summary, Government counsel opposes a voluntary departure request based upon a determination of potential outstanding warrants in existence for the respondent in his native country of "South Korea" relating to charges of embezzlement. Government counsel also advised that the Government has been unable to confirm proper issuance of the nonimmigrant visa that respondent utilized to enter the United States.

Respondent denies that he has ever been arrested or convicted of any crimes in Korea. He claims that he obtained his visas through regular procedures or customary procedures and denies any wrongdoing. Counsel for respondent argues

that he is currently married to a lawful permanent resident and that he has the means and willingness to depart from the United States and, in point of fact, he is identified as permanent resident or an individual with resident status in the country of Belize.

Based upon the record before us, the Court believes that respondent is eligible and deserving of voluntary departure and the application and request will be granted.

Accordingly, the Court would provide respondent with the maximum departure period available under current law, contingent upon posting a $1,000 bond.

Base upon the foregoing, the following orders shall therefore be entered:

ORDER

IT IS HEREBY ORDERED that in lieu of an order of removal, respondent be granted voluntary departure, such departure to take place without expense to the Government, on or before June the 15th, 2003, or any extension beyond that date as may be provided by the Immigration Department and under such conditions as that Department shall direct.

IT IS FURTHER ORDERED that such grant of voluntary departure is contingent upon respondent posting, within five business days, a $1,000 voluntary departure bond and otherwise presenting proof or evidence of possession of a suitable travel document.

IT IS FURTHER ORDERED that in the event the above contingency is not satisfied and/or respondent remains in the United States beyond the authorized period of voluntary departure, without further permission or authorization, that the following orders shall thereupon become immediately effective: respondent shall be deported and removed to the Republic of Korea.

IT IS FURTHER ORDERED that the request for termination of these proceedings be denied.

Dated: April 16th, 2003

/s/ROBERT BROWN
Immigration Judge

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
File A78-998-531
September 09, 2004

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A78-998-531-Houston
Date: Sep. 09, 2004

In re: CHUN, EUI SIK
IN REMOVAL PROCEEDINGS
APPEAL AND MOTION
ON BEHALF OF RESPONDENT: Yuen, Xenos M.
ON BEHALF OF DHS: Lisa Luis, Assistant Chief Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the Immigration Judge's April 16, 2003, decision. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

During the pendency of this appeal, the respondent filed a motion to remand, dated August 16, 2004. See 8 C.F.R. § 1003.2. We agree with the Department of Homeland Security's (the "DHS," formerly the Immigration and Naturalization Service) opposition to the motion. The respondent entered into the marriage during his removal proceedings, and is subject to a presumption that the marriage was not entered into in good faith. He has not submitted a complete copy of an adjustment application and thus has not provided clear and convincing evidence that the marriage is bona fide. See Matter of Velarde, 23 I&N

Dec.253 (BIA 2002); Government's Opposition to Respondent's Motion to Remand, August 23, 2004.

The motion to remand is denied and the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart form the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c),(f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the district director, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under Section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

/s/

FOR THE BOARD

APPENDIX C

U.S. Court of Appeals for the 5TH Circuit
Petition for Review from the Board of Immigration Appeals
No. 04-60904
January 4, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60904
Summary Calendar

EUI SIK CHUN,

Petitioner,

versus

ALBERTO R GONZALES, U.S. ATTORNEY GENERAL,
Respondent.

Petition for Review from the Board of Immigration Appeals
(No. A78 998 531)

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:*

Petitioner Eui Sik Chun seeks review of a decision of the Board of Immigration Appeals ("BIA") affirming, without opinion, the Immigration Judge's opinion. In

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

addition, the BIA's denial of his motion to remand in light of the marriage he entered during the pendency of his removal proceedings. For the reasons stated below, the petition for review is denied.

FACTS AND PROCEEDINGS

Chun is a native and citizen of the Republic of South Korea. He was admitted as a nonimmigrant visitor on August 17, 2000. The Immigration and Naturalization Service ("INS") issued a notice to appear dated September 10, 2002, alleging that Chun was subject to removal for having remained in the United States loner than permitted under the terms and conditions of his nonimmigrant visitor visa. The immigration judge ("IJ") found Chun removable and granted Chun voluntary departure.

The IJ denied Chun's motion to suppress evidence derived from an allegedly illegal search and seizure and, on appeal, Chun argued that this denial violated his due process rights. After officers arrested Chun outside of a convenience store gas station, they took his keys, drove to his home, and searched his home. Chun argued that his arrest and the subsequent search were illegal and filed a motion to suppress the documents seized from his home, pursuant to the Fourth Amendment's exclusionary rule. Without conceding the illegality of the arrest, the INS argued that even if the arrest were illegal, the INS casefile, specifically the I-213 Record of Deportable/Inadmissible Alien pulled from the government's National Immigration Information System ("NIIS") database, was untainted and need not be suppressed. In addition, the government responded that seized items, Chun's passport and I-94, were not even being offered into evidence. The IJ denied Chun's motion to suppress,

reasoning that there was nothing to suppress because no allegedly tainted evidence had been submitted to the court.

While his appeal was pending, Chun filed a motion to remand to the IJ to adjust his status to lawful permanent resident based on his marriage to a U.S. citizen. The BIA denied this motion, ruling that he had not overcome the presumption that a marriage during a removal proceeding is not entered in good faith. In particular, he had not filed an application to adjust status, which would have included documentation showing joint ownership of property, documentation showing commingling of financial resources, birth certificates of children born to Chun and his spouse, if any, and affidavits of third parties having knowledge of the bona fides of the marital relationship. Instead, he submitted a marriage license dated December 2, 2002, a receipt for his wife's immigrant petition for relative (Form I-130) filed on April 15, 2003, and his wife's certificate of naturalization issued July 30, 2004.

DISCUSSION

A. Motion to Remand

The requirements for a motion to remand are, for all practical purposes, the same as those for a motion to reopen. *See Matter of Ige*, 20 I&N Dec. 880, 884 (BIA 1994); *see also* 8 C.F.R. § 1003.2(c)(4). A denial of a motion to remand, therefore, is reviewed for abuse of discretion. *See Morales v. INS*, 116 F.3d 145, 147 (5th Cir. 1997). In light of the "broad discretion" given to the Attorney General to grant or deny motions to remand or reopen, this court employs a very deferential abuse of discretion standard in reviewing the Board's decision. *INS v. Doherty*, 502 U.S. 314, 323 (1992); *Zhao v. Gonzales*, 404 F.3d 295, 303 (5th

Cir. 2005) ("[W]e review the BIA's denial of a motion to reopen or to reconsider under a highly deferential abuse-of-discretion standard."). "It is our duty to allow the decision to be made by the Attorney General's delegate, even a decision that we deem in error, so long as it is not capricious, racially invidious, utterly without foundation in the evidence, or otherwise so [aberrational] that it is arbitrary rather than the result of any perceptible rational approach." *Zhao*, 404 F.3d at 304 (internal quotation and citation omitted).

Chun argues that the BIA abused its discretion by denying his motion to remand. To be eligible for remand, Chun was required to make a prima facie case that he was eligible for an adjustment in status under 8 U.S.C.§ 1255. Such a prima facie case is made by submitting completed application that is supported by clear and convincing evidence establishing a good faith marriage.[1]See 8 C.F.R. § 245.1(c)(9) (noting that aliens who enter into marriage during removal proceedings are ineligible for adjustment of status unless the marriage is proven to be bona fide by clear and convincing evidence).

As the BIA notes, Chun's motion to remand was unaccompanied by an adjustment of status application with the type of supporting evidence of his good faith marriage

---

[1] 8 C.F.R.§ 204.2(a)(1)(iii)(B) details the type of evidence that should be presented to demonstrate a good faith marriage. For example, the petitioner could submit documentation of joint ownership of property, a lease showing common residence, documentation of commingling of financial resources, birth certificates of children born to the petitioner and his spouse, and affidavits of third parties having knowledge of the bona fide nature of the marriage.

outlined in 8 C.F.R. § 204.2(a)(1)(iii)(B). Rather, he submitted a marriage license dated December 2, 2002, a receipt for his wife's immigrant petition for relative (Form I-130) filed on April 14, 2003, and his wife's certificate of naturalization issued July 30, 2004. Because this evidence is insufficient to establish a prima facie case that his marriage was entered in good faith, we hold that the BIA properly denied Chun's motion to remand. Chun had an opportunity to present clear and convincing evidence that his marriage was bona fide, and he failed to do so. See Matter of Velards, 23 I&N Dec. 253, 257 (BIA 2002) (noting that Congress, in amending the marriage fraud provisions, intended to allow aliens married after proceedings had been initiated "one opportunity to present clear and convincing evidence that their marriage was bona fide").

B. Evidence Suppression

A deportation proceeding is a civil proceeding with purposes different from criminal proceedings. The Fourth Amendment's exclusionary rule does not apply to deportation proceedings. *See Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Therefore, even if we concluded that the NIIS data about Chun was derived from an illegal search and seizure, the immigration court would not need to suppress it.

C. Substantial Evidence

This court reviews issues of fact for substantial evidence. 8 U.S.C. § 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."); *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 483-84 (1992); *Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994). Substantial evidence is lacking only if the petitioner

establishes that the record evidence is so compelling that no reasonable factfinder could fail to find the petitioner eligible for withholding. *Elias-Zacarias*, 502 U.S. at 483-84.

Chun asserts that the IJ's conclusion that he was deportable was not supported by substantial evidence. However the NIIS data clearly showed that Chun only was authorized to remain in the United States until February 17, 2001. This evidence is sufficient to establish that the IJ's decision was supported by substantial evidence.

In addition, Chun argues that the NIIS records are inadmissible because they were not properly authenticated. Even if admissible, he asserts they are hearsay and insufficient to establish his deportability. However, the rules of evidence do not apply to deportation proceedings. *Bustos-Torres v. INS*, 898 F.2d 1053, 1055 (5th Cir. 1990). "Nonetheless, due process standards of fundamental fairness extend to the conduct of deportation proceedings." *Id.*(citing *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)). Therefore, "the test for admissibility ... is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law." *Id.* The INIIS record contained probative data about Chun's deportability and the IJ did not err in concluding that the record was reliable where the INS attorney provided that it came from an official government database. Therefore, the IJ properly admitted the evidence.

CONCLUSION

The petition for review is DENIED.

United States Court of Appeals, Fifth Circuit
Filed January 4, 2006
Charles R. Fulbruge III, Clerk

APPENDIX D

U.S. Court of Appeals for the 5TH Circuit
On Petition for Rehearing
No. 04-60904
March 08, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60904

EUI SIK CHUN
Petitioner
v.

ALBERTO R GONZALES, U.S. ATTORNEY GENERAL,
Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING

Before BARKSDALE, STEWART, and CLEMENT, Circuirt Judges,
PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

U.S. Court of Appeals
Filed Mar. 08, 2006
Charles R. Fulbruge III
Clerk

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court
Transcript (Excerpts)
File A78-998-531
October 16, 2002

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of | File A 78 998 531

EUI SIK CHUN, Respondent) IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before SUSAN YARBROUGH, Immigration Judge

Date: October 16, 2002 Place: Houston, Texas

Transcribed by DEPOSITION SERVICES, INC.
At Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Michael Leppala, Esquire	Terry Kim, Esquire

* * *

Service, you could have contacted the court, instead you submitted all these brief trail motions and you don't even have a copy of the Notice to Appear.

A. That's right, I have a record of the removable alien which is the Form 213.

Q. The I-213, right.

A. 213, right.

JUDGE TO MR. WOOD

Q. Mr. Wood, would you make a copy of the charging document for counsel.

JUDGE TO MR. YUEN

Q. Now, I note that you filed with the court and the Service replied motion to suppress evidence at this point in time I don't see any evidence that needs to be suppressed or is potentially suppressible, I will receive the motion, the motion is preliminarily denied.

JUDGE TO THE RECORD

But I will receive it as Exhibit, the motion and the Service response as Exhibit no. 3.

MR. YUEN TO JUDGE

Q. Your Honor, I believe that my client is entitled to evidentiary hearing and I ask also for a motion to subpoena some --

A. I understand that, I am not going to grant your motion for subpoena at this point in time, let's get something

straight right from the start, first of all, Mr. Yuen, you are on petty shaky grounds when you come to my courtroom and you don't even have a copy of the charging documents. Secondly, I am not goint to allow you to complicate what is a relatively simple matter, I have limited jurisdiction, limited involvement in the, in discovery, in proceedings to determine, with regard to the underlying arrest and there is essentially, what's the word I am looking for --

(OFF THE RECORD)
(OFF THE RDCORD)

JUDGE TO MR. YUEN

Q. Limited jurisdiction or concern of this court to involvement as to how evidence is obtained and presented. If you want a hearing on it, I will give you a hearing but from what the Service has presented their documents and their materials were based upon an anonymous tip, they checked their own records, and neither of those things are suppressible.

A. Your Honor, I disagree with that because --

Q. Well, you can disagree with it, and I recognize your reservation but I have a courtroom full of people and I am not going to go on with this at this point in time.

A. But, Your Honor --

Q. So your objections are noted, and I will schedule this matter for a preliminary hearing, make arrangements for a Korean interpreter and I believe that is the language that is

required from what was previously brought to the court's attention, is that right?

A. Yes, Your Honor.

Q. And next time you come into my court you should at least be prepared by recognizing and knowing what the charges are against your client, counsel and be in possession of the charging document.

A. Your Honor, are you setting up a hearing for motion to suppress?

Q. No. I have preliminary denied your, right now there is nothing to suppress, you claim that your client was unlawfully arrested by the Immigration Service, that is outside my jurisdiction and outside my concern. You think your client has been mistreated by the Immigration Service, take it up with the Immigration Service, take it up with the U.S. District Court.

A. All right.

Q. You are not going to raise that, there is no basis to terminate these proceedings because of your claim that your client was unlawfully arrested, period.

A. Your Honor, may I make a record for this?

Q. Not at this time, I will reschedule the matter for hearing on –

(OFF RECORD)

(OFF RECORD)

JUDGE TO MR. YUEN

Q. On March the 12th, at eleven o'clock in the morning, you will need to notify your client of the time and date of the hearing, as well as the responsibility that he be present, if he fails to appear this matter with nevertheless go forward in his absence and potentially result not only to the issuance of an order for his deportation and removal, but he would otherwise remain ineligible for certain immigration benefits that might later become potentially available for a period of time thereafter.

JUDGE FOR THE RECORD

The motion to issue subpoena will be received into the record as Exhibit no. 4, at least at this point in time, I don't see need or purpose to requiring that a subpoena be issued. The motion to abate will be received as Exhibit no. 5. The response to the Service motion to suppress will be received as Exhibit no. 3A.

JUDGE TO MS. WILKINS

Q. Ms. Wilkins, if you can file or refile what documents or evidence you will be seeking to have considered in support of the allegations and charge, file it with the court by --

(OFF RECORD)
(OFF RECORD)

JUDGE TO MS. WILKINS

Q. File it with the court by March the 3rd, then that

* * *

Q. Also that the court addressed to the issue that based upon that tips there was some other search being found out whether or not those are true against alien whether or not he should be deported.

A. And as I told you, counsel --

Q. And since --

A. I am not going to hold a hearing into the circumstances of the arrest.

Q. I am trying to explain to you though --

A. I don't want to hear any more or your explanations, all right –

Q. You --

A. I have ruled, I have made my decision, your intention to appeal from this decision has been self evident from the very beginning, and so we are going to move on to something that I think is relevant. Are you going to present any evidence with regard to time, place and manner of entry?

Q. We do not.

A. All right, well then I find that the charge is sustained based upon the computer printout --

Q. You Honor, I --

A. Submitted by the Immigration Service --

Q. We have also asked to strike those documents that were submitted, there was not authentication about those documents submitted to you, no one come here to testify and –

JUDGE TO MS. WILKINS

Q. Ms. Wilkins, where did you obtain the, the NIIS --

A. From our special Government data bases, it is a computer system.

Q. Who was it that obtained the documents or the information for the data base?

A. It was initially, these documents were initially attached to a motion by the attorney, Pauline Applebaum of our office and I believe that she obtained those documents and then I resubmitted the exact same documents to the court.

JUDGE TO MR. YUEN

Q. Did you want to submit any documents or any evidence in contradiction of the --

A. First, Your Honor, if that --

Q. It is a yes or no question, counsel.

A. If that was all --

Q. It is a yes or no question --

A. I can't --

Q. Do want to present any evidence to dispute the information that I have been advised comes from the official Service records --

A. Well, I --

Q. That is a yes or no question.

A. I can't dispute.

Q. All right, you cannot dispute?

A. No, I cannot dispute something that is not in front of the court.

Q. It is in front of me.

A. Well, I would object to its submission.

Q. And your objection is overruled.

A. So those record are admitted into the record?

Q. I am going to admit them right now.

A. Well, I make my objection.

Q. That's fine, Your Honor.

A. All right.

JUDGE FOR THE RECORD

I will, I am going to separate the Service materials will be received Exhibit no. 6 for identification purposes.

MR. YUEN TO JUDGE

Q. Could you identify those, Your Honor?

A. Tabs A-H

MS. WILKINS TO JUDGE

Q. Your Honor?

JUDGE FOR THE RECORD

With the exception of Exhibit I, which I will receive for evidentiary purpose in support of the charge that respondent was, is an overstay after having been admitted on August 17, 2000, with an authorization to remain until February 16th, 2001. And I will receive that document as Exhibit no. 7. Your motion to, your opposition to the Service exhibits will be received as Exhibit no. 8. And I find that this is an official Government record, it is not something that is suppressible, again I am not going to go into the circumstances of respondent's arrest and in the absence of contrary or other evidence or information I find that respondent is subject to removal pursuant to Section 237(a)(1)(B), allegations 4 and 5 are sustained, by what I find to be clear and convincing and now unequivocal evidence and similarly 237, the 237(a)(1)(B) charge is also sustained.

JUDGE TO MR. YUEN

Q. In the event it becomes necessary to order respondent's removal, does he wish to designate a country or would he prefer not to do so, counsel?

A. We prefer not to do so.

Q. All right.

JUDGE FOR THE RECORD

In the absence of choice then, the court would direct removal to respondent's native country, the Republic of South Korea.

JUDGE TO MR. YUEN

Q. Will you be seeking withholding of removal with regard to that designation?

A. Yes, Your Honor.

Q. All right.

A. And voluntary departure.